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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1904.

No. 8.

HUGH STEVENSON ET ALS., APPELLANTS,

vs.

WM. FAIN ET ALS., APPELLEES.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

BRIEF OF CHARLES SEYMOUR AND WEBB, McCLUNG & BAKER, COUNSEL FOR APPELLANTS.

CHARLES SEYMOUR, *Counsel.*

T. S. WEBB,
HU. L. McCLUNG,
L. M. G. BAKER,
Of Counsel.

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C. 19089

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APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

BRIEF OF CHARLES SEYMOUR AND WEBB, McCLUNG & BAKER, COUNSEL FOR APPELLANTS.

This is a suit in equity, brought by the appellants in the United States circuit court at Knoxville, Tennessee, to remove a cloud from the title to about 10,000 acres of mountain land lying on the line between Tennessee and North Carolina. The land lies either in Monroe county, Tennessee, or in Cherokee county, North Carolina.

If the State line between Tennessee and North Carolina is located where appellants claim it to be, then the land is

in Tennessee; but if it is located where appellees claim it to be, then the land lies in North Carolina. If the land is in Tennessee, then appellants are entitled to the relief sought, because they claim under grants from the State of Tennessee, while appellees claim under grants from the State of North Carolina, and expressly disclaim title to any lands in Tennessee.

The honorable circuit judge at Knoxville was of the opinion that the land was in North Carolina, and pronounced a decree dismissing the bill of appellants. From this decree appellants appealed to the circuit court of appeals for the sixth circuit, and that court affirmed the decree of the circuit court. Appellants have appealed to this court and assigned errors.

The Hon. H. H. Lurton, who delivered the opinion of the court of appeals, has preluded his opinion with a correct statement of the case, and we hereby adopt said statement.

Record, pp. 245–'6–'7–'8–'9.

The map, filed as part of the opinion (at p. 248 of the Record), is a reduced copy of Exhibit "A" to W. D. Hale's deposition (p. 244), which fairly represents the land in controversy.

The only question in the case is whether the State line runs with the red line, as claimed by the appellants, or with the black line, as claimed by the appellees. Both the circuit court and the court of appeals held that the true State line runs with the black line, and that the land in dispute is on the North Carolina side of the line, and belongs to defendants.

It is conceded by all parties that the point marked "County corner" on the northeast and the point marked "Gold Bryson gap" on the southwest are on the true State line, and are on the "extreme height" of the "Great Iron" or "Smoky mountain," as called for by the cession act of December 3, 1789 (Record, pp. 246–'7), and are on the "main ridge" and on the "extreme height of the same," as called for by the acts of 1821 of Tennessee and North Carolina ratifying and adopting the line run by the commissioners.

The only question, then, is whether the State line between these two points is the black line or the red line; or whether the black line or the red line is on the "extreme height" of the Smoky mountain and on the "main ridge" and on the "extreme height of the same."

Brief and Argument on Behalf of Appellants.

I.

For the proper understanding of how and where the State line was fixed, we invite the attention of the court to the official acts done in fixing the line, and the circumstances under which they were done.

What is now Tennessee was formerly a part of North Carolina and was a wilderness inhabited alone by Indians and wild beasts. On account of the high mountain range which we are considering, this western portion of North Carolina was practically inaccessible to the North Carolina authorities, so that it was impossible for them to exercise jurisdiction in the same. Accordingly, in 1789, North Carolina ceded this territory to the United States. The cession

act, so far as it fixed the eastern boundary of the ceded territory, is quoted on page 246 of the printed Record, and is also found in Shannon's (Tenn.) Code, page 124. The Tennessee constitutions (of 1796, 1834, and 1870) also set out this line in article 1, section 31. In the cession act and in said constitutions, the line in dispute, after striking the Smoky mountain, is described as follows: "Thence along the *extreme* height of said mountain to the place where it is called Unicoi or Unaka mountain," &c. This call includes that portion of the line in dispute. The cession act and the constitution of 1796 were the guide by which the commissioners ran the line in 1821, and by this guide they were required to follow the "extreme height" of the mountain for a distance including the line in dispute.

The commissioners made their report, and the act of 1821 (both Tennessee and North Carolina) adopted their report and described the line run, as reported by the commissioners, as follows: "Continuing southwestwardly on the extreme height thereof (Smoky mountain) to where it strikes Tennessee river and crossing Tennessee river at the distance of sixty-five (65) miles from the beginning; from Tennessee river to the *main ridge* and along the *extreme height* of the same to the place where it is called Unicoi or Unaka mountain," &c. (Shannon's *Code, sec.* 72, *page* 125).

There is absolutely no ambiguity in this call in the cession act, the constitutions of Tennessee, or in the report of the commissioners as carried into the act of 1821, and there is *no contradiction* between this call in the cession act and constitution on the one hand and the report of the commissioners on the other. They all call for the *extreme height* and the "main ridge" of the Smoky mountain. There is,

however, a *difference* in this call. The cession act and the constitutions call for this line as running along the extreme height of Smoky mountain to where it is called Unicoi, and no halt is made at the crossing of Tennessee river, and no mention is made of such crossing. On the other hand, the report of the commissioners calls for the *extreme height* of Smoky mountain down to Tennessee river, and there makes a sixty-five-mile station, but then goes immediately to the *main ridge* and continues along the *extreme height* thereof. The only question that could possibly arise would be, which is the *main ridge* and where is the *extreme height* of said main ridge? This question does not arise upon the face of the calls, but is a question of fact, just as it is a question of fact "where is the Smoky mountain"? It will be noted that in the cession act every crossing of water is noted, as "where the Watauga river breaks through" and "where the Nolichucky river runs through," and to the "Painted rock on French Broad river," until the Smoky mountain is reached, and thence the call is a general one, as follows: "Along the extreme height of the said mountain to the place where it is called Unicoi or Unaka mountain," &c., entirely ignoring the water-crossings in this call, although this line confessedly crossed the Tennessee river and the Hiwassee river, and defendants now claim that it crosses Tellico river within the limits of the present dispute.

The commissioners did not begin the line on Stone mountain at the Virginia line, but began at the Cataloochee turnpike, below or beyond all the water-crossings called for by the cession act, and the only waters they crossed from there to the Georgia line were the Tennessee river and the Hiwassee river, and these were carefully noted and called for in the report.

The question naturally arises, why the cession act mentioned all other water-crossings and ignored the Tennessee and Hiwassee rivers?

As before stated, the cession act was passed December 3, 1789. At this early date the only white settlement in Tennessee was a mere handful of pioneers in the northeast corner, in Carter county near the Virginia line, which was known as "the Watauga settlement." This was the first settlement in the great valley of east Tennessee, and was made up of Pennsylvanians and Virginians who had drifted down the Cumberland valley and the Valley of Virginia. Very few of these settlers were from North Carolina. They were confined to the territory north of the French Broad and knew the waters that crossed the mountain in that section. The territory south of the French Broad was occupied by the Indians, and it is doubtful whether the North Carolinians who drafted the cession act knew that the Tennessee or Hiwassee river crossed the mountain. The Cherokee settlements were along near the Tennessee river and on both sides of the mountain. The report of the commissioners (1821) calls for the "old Indian town of Talassee" at the Tennessee river, and for the path leading from "the valley town to the over hills towns" at the place where the line reached Unicoi mountain. No survey had been made of this line until 1821, and then the commissioners supplied the omission of the cession act on this unknown part of the line and called for every water-crossing. Not only did they note the water-crossings, but they further called for "near the head of the West fork of Tellico river" in designating the path at Unicoi mountain. This was still a wilderness and occupied alone by the In-

dians, and the only way the commissioners could designate the line was by reference to the mountains, Indian paths, Indian towns, and water-courses. They knew of the Tellico river, and called for "near the head of the West fork of Tellico river," a few miles southwest of where appellees now claim that they ran the line across Tellico river, without noting it or calling for it, although this was the main stream of that river, and the West fork was an insignificant branch.

It will be observed also that the cession act does not call for a line running southwestwardly, or otherwise give the course of said line; but the commissioners call for running a *southwestwardly* course from Cataloochee turnpike to the Bald rock on the summit of the Smoky mountain, and continuing southwestwardly to the Tennessee river. The calls from the Tennessee river to the Unicoi mountain do not mention the points of the compass, but lie along the "extreme height" of the "main ridge" of the mountain, as it meanders, no matter how sinuous its course may be. It will also be observed that, although the line from Cataloochee turnpike to the Tennessee river called for a southwesterly course, and the general course is southwesterly, still at points in that line the course is directly west and directly south, just as it is on the red line from "County corner" to "Gold Bryson gap." Also at points northeast of the Cataloochee turnpike, which was not run by the commissioners and over which the cession act gave no courses, the line runs due north, due west, and due south, though its general course is southwesterly.

These matters are noted now, but will be referred to again in discussing the assignment of errors.

II.

The honorable circuit court of appeals (pp. 249–'50) holds that the line claimed by the defendants (black line) is established by the great weight of the evidence, and then sets out the evidence upon which this finding is rested.

On page 250 (under the 6th head) the court says:

"The course of the line given in both the cession acts and the confirmatory acts of 1821 is *southwestwardly*, and this course is that pursued by the State ridge (black) line, while to pursue the other line would require a sharp departure from such general course and the adoption of a southeasterly course for several miles, then a southerly course, then a westerly course until the well marked line at 'Gold Bryson's gap' is reached again."

In this statement the honorable court was undoubtedly in error.

The cession act is quoted in full on pages 246 and 247, and the course of the line is not given as southwestwardly or any other direction.

Again, in the act of 1821 (pp. 247–'8) the line is given as southwestwardly until the Tennessee river is reached, and from the Tennessee river (including the line in dispute) no course is given until the 101-mile post is reached at the Unicoi turnpike road, from which a due south line to the Georgia line is called for.

III.

On page 249 (under the 5th head) the honorable court says:

"Tradition concurs with the other evidence in establishing the line run as the line along State ridge (black

line), for that ridge has been always known as the State ridge."

It is respectfully submitted that not a single witness testifies that this ridge was known as the State *line* ridge or as the *State line*. Not a single witness testifies that this line was run and marked by the commissioners, or that it was adopted by the commissioners as the true State line, and certainly the report of the commissioners does not call for this line, because it does not call for *crossing Tellico river*, as it must have done if that line had been adopted, although the commissioners knew it was Tellico river and called for "near the head of the West fork of Tellico river," a few miles further on, and although they noted and called for *every* other water-crossing on the line. It is true that several witnesses testify that this ridge was known as "State ridge," but not one of them can say *why* it was called State ridge. Some of them say they *supposed* it was because it was the State line, but not one of them has any information on the subject, and not one assumes to know that it was the State line or was called State ridge because it was the State line.

The evidence on this subject is as follows:

O. W. Muller (p. 23) says it was called "State ridge" the first time he was there, about ten years ago.

W. D. Hale (p. 30) says he first went to the locality six years ago, and (p. 31) this ridge was then called "State ridge;" also on page 36 to same effect, and also on page 40.

C. M. Watson (p. 45) says about six years ago Cal. Colvard (then about 82 years old) told him the State line was on State ridge; that he was a lad or boy, was on a survey, and

would climb a tree and wave a handkerchief, and they marked a holly after crossing Tellico river; supposes Colvard was talking about the State line survey. Colvard said "they would find marked with a tomahawk."

Jasper L. Fain (p. 58) says he first went upon the land in 1889, and it was called State ridge then.

E. R. Hunsucker, aged 79 years (p. 62), has lived in Cherokee county, N. C., since 1839; it has been known as State ridge.

J. R. McClellan, aged 36 years (p. 71), says it has *always* been known as State ridge; but he is only 36 years old.

B. Frank Payne, aged 70 years (pp. 89–90), has lived in Monroe county, Tenn., all his life and says the *red line* has been always known as the *State line*, and they never knew anything else ever since 1840; and says Larkin Brannum and Joe Graves told him the red line was the State line, and Brannum said he was on the survey, and the party got lost in a fog and went on to State ridge by mistake, and when the fog cleared he was ordered by the surveyor to deface the marks on State ridge and mark the red line.

H. Houston Miller, aged 52 years (p. 94), knew Uncle Joe Graves, who claimed to have been on the survey, and he said they got lost in a fog and did not find out they were off the line until they reached Tellico river, and then they stopped the line and made a plat calling for the red line. In 1871, Isaac Tate, 84 years old, told witness he was with the survey, and they got lost in a fog and run to the river and found it was wrong and did not run the other (red) line, but made a plat calling for it. Witness says it has been called State ridge ever since he had been there—about 20 or 30 years. He never talked to a man who thought

State ridge was the State line, and it was not called State ridge because it was the State line, but because a mistake was made there (p. 96). The accounts given by Joe Graves and Isaac Tate were currently received in the neighborhood as true and accepted as tradition (p. 96).

Jno. A. Miller, 53 years old (p. 97), was a nephew of Uncle Joe Graves, and heard him say at different times that he was with the party that run the State line, and that they made a mistake on account of a fog, and when they found they were lost and had made a mistake they made a plat or call around the heights of the mountain—the watershed—and said "these calls were adopted as a part of the line reported to the legislatures of the two States" (p. 98).

Dr. J. W. Patton, aged 72 years (p. 100), came to Murphy, N. C., in 1849; was first on State ridge in 1859 or 1860; heard it spoken of as State ridge since he came to the country; had conversations with Wm. Graves in 1859 and with Jimmie Whittaker in 1860. They both claimed to have been with the survey, and said they run down State ridge to Tellico river and marked a holly tree "86. M." He says nothing about the fog spoken of by Joe Graves and Isaac Tate.

Isaac Lovingood, aged 68 years (p. 106), lives on Hanging Dog, N. C. It has been called State ridge fifty years and suppose it was because State line was there.

B. F. Lovingood (p. 107) has known it called State ridge for forty years. A man showed me some trees marked and told me it was the State line.

Zimri Roberts, 48 years old (p. 118), was born and raised in Cherokee county, N. C. It was always called State ridge, but I do not know why.

This is the entire evidence on the question of "traditions," and we respectfully submit that there is not a particle of evidence tending to show a tradition that the State *line* was on the State *ridge* unless the fact that it was called State ridge can be taken as evidence of a tradition that the State line was on that ridge.

The only evidence of any tradition is the testimony of Payne Houston Miller and John A. Miller, who received from Larkin Brannum, Joe Graves, and Isaac Tate the information that they were on the survey and that the surveyors got lost in a fog and found it out *when they got to the Tellico river*, and then stopped the line and made a plat calling for the red line. Defendants' counsel excepted to this testimony on the direct examination, but waived the exception by cross-examining the witnesses on this same subject. These witnesses show that it was called State ridge because of the mistake caused by the fog.

Moreover, the honorable circuit court of appeals only claims a tradition that the ridge has always been known as State ridge, and not that it has been known as the State line. If this was a part of the main ridge, as claimed by the defendants, there was no more reason to call it the State ridge than to call any other 4 miles of the 101-mile line State ridge. The proof shows that this ridge was called State ridge only from county corner to the Tellico river, a distance of 4 miles, and the balance of this black line (about 3½ miles) was called Jenks' ridge, and not State ridge.

It is a fact of common knowledge that mountain people give a name to every ridge and spur, and many of such names have no meaning to the outside world.

Furthermore, evidence of tradition is at most mere hear-

say evidence, and, while it may be received on questions of ancient boundaries, it can have no weight against such evidence as the cession act and the act of 1821, both of which are plain and clear in designating this line.

IV.

The honorable circuit court of appeals (p. 249) finds as a fact that the distance from "County corner" to "Gold Bryson gap," over the black line, is six miles, and the distance between these two points, over the red line, is twelve miles, and that to adopt the red line will make the line from Cataloochee turnpike to Unaka turnpike 107 miles instead of 101, as called for in the report of the commissioners, whereas if the black line is adopted the distance will be 101½ miles, or very near to the distance reported.

This is true and raises a plausible inference in favor of the black line. But the well-settled rule is that a call for a natural boundary—such as the "main ridge"—will control the call for distance.

Brown *et al. vs.* Huger, 62 U. S., 305–'6.
Brown *vs.* Pryor, 20 U. S., 7.
McIver *vs.* Walker, 17 U. S., 444.
Hebard *vs.* Belding, 43 C. C. A., 296.
(S. C., 103 Fed. Reporter, 541.)

If it appears that the natural boundary called for is the red line, then this finding of the honorable circuit court of appeals is immaterial and cannot deflect the line to State ridge. We will show later on that the red line is the natural boundary called for.

V.

The honorable circuit court of appeals (p. 249) says the North Carolina act of 1821 recites that the line run by the commissioners was "mile marked at the end of each mile," and further says that an ancient holly tree, marked "86.M," was found on the State Ridge line, which *by blocking is shown to have been marked in 1821* and to be 86 miles from the beginning.

The honorable circuit court of appeals fell into an error of fact in stating that the holly tree marked "86.M" on the southwest side of Tellico river was blocked and showed that it had been marked in 1821. This tree was not blocked. The only holly tree that was blocked was the holly tree spoken of by Jasper L. Fain, one of the defendants, in his second deposition, and the block filed as Exhibit "B" to his deposition (p. 104). He states distinctly that the holly blocked by him was not the holly claimed to be marked "86.M," but a different holly altogether. Francis Lovingood (p. 105) speaks of the same holly, Exhibit "B."

Again, whether the holly claimed to be marked "86.M" is really marked "86.M" and is a State line tree is a doubtful question in the record.

Oscar W. Muller, an experienced surveyor, ran this line in 1895–'6 (p. 19) and says of this holly tree:

"We found a holly with some semblance of letters and figures—a figure 8, tolerably plain, a piece of an M—the remaining fragment could be tortured into several things, being very indistinct" (p. 20).

Again, on cross-examination (p. 23) he says:

"That holly has no marks on it. It has some figures.

It has one figure. *They are not surveyors' marks.* It has a figure '8' that is tolerably distinct, and then it has three prongs of an 'M' on it, and it has another thing on it. I don't know what you would call it—you can make a piece of a '7,' '5,' or '6' out of it.

On the other hand, Jasper L. Fain, the leading defendant in the case, says (on p. 50):

"And across the river here stands a holly marked '86.M,' the '86' in figures and a large 'M.'"

This is all that he states about the marks on this holly, and is all that he says about the holly except that he says he saw the holly in 1893, when McClelland was running the State Ridge line (p. 51).

On page 59, A. A. Fain, another defendant, says he was with McClelland and "found a plainly marked holly, marked '86.M'—plainly marked;" and on page 60 he says:

"There was on it the figures '86,' and looked like they were six or seven inches long, and right under them the letter 'M.'"

F. M. Lovingood (p. 65) says:

"Some two hundred yards west of the river we found a large holly. That holly was plainly marked 86–M, and near that holly was a spruce pine marked State line."

John R. McClelland, a North Carolina surveyor, ran this line in 1893, and says (p. 70) he found a holly tree marked "86–M," and on page 71 he says the marks on this holly appeared to be "very old." This tree was not blocked, and the foregoing is the only proof in the record of the marks upon it.

We respectfully submit that this proof utterly fails to show that this holly tree was marked in 1821, or that it was marked by the State commissioners, or that it is on the State line. The testimony of Muller shows that he examined this tree closely in the winter of 1895–'6, and that it was not marked "86.M."

Of the other four witnesses who say this holly was *plainly* marked "86.M," the two Fains are defendants and vitally interested in establishing the State Ridge line. They were with McClelland in 1893, when he professed to run the line for the State of North Carolina; but it is clear that he was running this line at the instance of the Fains and for the purpose of establishing their title to this land. It is claimed that he was appointed by the State of North Carolina to run it; but even if this be true, it was an *ex parte* proceeding on the part of North Carolina and was instigated by the defendants, and they were present with McClelland running the line.

B. F. Lovingood (p. 108) says he has known the locality for forty years. His deposition was taken January 5, 1901. He says the first settlements on the disputed territory were about twenty years before, or in 1881, and it was very thinly settled ten years before, or in 1891. It thus appears that the Fains began about the time (1891) the settlements began to prepare a claim to the land, and hence the McClelland survey in 1893.

The other two witnesses, McClelland and F. M. Lovingood, who say this holly tree was marked "86 M.," were North Carolina surveyors and naturally biased in favor of the North Carolina claim. None of these four witnesses are asked particularly about the appearance of the marks, and

none of them claim to have made a particular examination, while Muller did examine particularly and shows that the tree is not marked "86 M," and that the marks are not surveyors' marks, and none of them assume to give the age of the marks.

The question involved in all this testimony about this holly is whether this holly was marked by the commissioners in 1821 as being a mile tree on the State line run and marked by them. The proof offered is merely suggestive and falls far short of establishing the claim of defendants, even if we give it the fullest force and effect.

(1.) This tree is not called for in the reports of the commissioners, as stated in the act of 1821.

(2.) None of the commissioners or surveyors or other persons who were along when the line was run are produced to identify this tree and couldn't be, because all are presumably dead.

(3.) No tradition is shown as to this tree or its marks.

We concede the impossibility of producing direct and absolute proof, but insist that the proof produced is not sufficient to deflect the line from the "extreme height of the said mountain" called for by the cession act and from the "extreme height" of the "main ridge" called for by the act of 1821.

The intention of both acts is to designate the *backbone* of the Smoky mountain, and the commissioners had no right or authority to run the line anywhere else.

VI.

The honorable circuit court of appeals (p. 249) finds that no marked tree is shown on the red line or main-ridge line, and largely bases its decision upon this fact. On page 255 this fact is cited as constituting the main difference between this case and the case of *Hebard vs. Belding*, 43 C. C. A., 296. In that case the line claimed by the North Carolinians had 41 trees on it, all conceded to be State line marks and to have been made by the commissioners in 1821, and the honorable court so held; but the court held that, even admitting that the Slick Rock Creek line was run and marked by the commissioners in 1821, still it must have been done tentatively and was not adopted as the State line, because the call was for the "main ridge," and this marked line up Slick Rock creek and Fodder Stack mountain was not on the "main ridge."

That case and the case at bar are almost identical in fact and feature. In each case the North Carolina claimants seek to claim lands on the west or Tennessee side of the main ridge or backbone of the mountain, and in each case the land sought is at a point where the main mountain curves between two points, and they claim to run a chord between the two given points, so as to throw the contents of the segment thus cut off into North Carolina, and in each case they undertake to justify this departure from the main ridge by claiming to have found a marked line along the chord, and in each case the amount of land involved is 8,000 or 10,000 acres, and in each case the length of the line between the two given points along the top of the main ridge is 10 to 12 miles. In the Hebard case only

three marked trees were found on the main ridge line, and it was doubtful whether these were State-line marks, while 41 marked trees, admitted to be State-line marks, made in 1821 by the commissioners, were found on the chord or Slick Rock Creek line. The map embodied in the opinion in the Hebard case shows exactly how the Slick Rock Creek line happened to be run. As the commissioners approached the Tennessee river from the northeast the mountain broke off into three spurs. One turned to the right and reached the river exactly opposite the mouth of Slick Rock creek, and is marked "Lester's ridge." One turned to the left into North Carolina, and is not named on the map. The third continued straight down to the river, and this was the one the commissioners should have run and did finally adopt, as it connected directly with the hangover on the other side of the river. However, for the reason that the Lester ridge was more prominent at the point of divergence, or for some other reason not disclosed, the commissioners first ran down Lester's ridge and there crossed the river and ran up Slick Rock creek and the Fodder Stack mountain until they reached the top of the main ridge, where the Fodder Stack joined it. They marked this line freely, but the honorable court held that this line was tentative and that the main ridge was the true line, because the commissioners, even after running and marking this line, *reported* the true line as being on the main ridge.

It must be borne in mind, as the honorable court said in the Hebard case, that the authority of the commissioners, and their only authority, was to "settle, run, and re-mark" the line "agreeably" to the session act, and it was their duty to locate the line agreeably to the call of the cession

act for the "extreme height" of the Smoky mountain. They had no authority to depart from this call.

It must also be borne in mind that this country was in 1821 a wilderness, occupied only by the Indians, and these commissioners were the first white men to traverse the crest of that mountain. There was no ambiguity in the call of the cession act for the "extreme height" or backbone of the Smoky mountain; but to find that backbone was another thing, and this is what the commissioners were required to do in this wilderness.

It is a matter of common knowledge that the backbone or extreme height of a mountain range is not a straight line and is not level or of uniform height. It winds from right to left and is a succession of peaks and gaps.

It is also a matter of common knowledge that spurs or high ridges constantly break off from the backbone, running off in various directions, and are frequently higher than the main mountain for miles. Indeed, some of the spurs are higher than the main mountain at the points where they break off, and some of them break off from the main mountain exactly in the same direction in which the main mountain is generally trending, while the main mountain turns to the right or left, as the case may be. So it is that a man walking along the top of a mountain cannot always know at the point of junction which is the spur and which is the main mountain, and cannot know until he follows one or the other tentatively for a sufficient distance to satisfy himself. It often happens that the highest peaks of a range are on the spurs and not on the backbone.

The commissioners were required to run the extreme height of this mountain range for more than 100 miles

through a wilderness. The cession act did not even give them a *course* to run by. They were to run with the extreme height of the mountain. The extreme height of this mountain varies from about 3,000 to 6,000 feet, showing the inequalities of the backbone elevation. Its course was sometimes southwest, sometimes south, sometimes west, sometimes southeast, and sometimes east, but its general course was southwest.

It was a difficult matter for strangers to find the backbone of this mountain, with its irregularities of elevation, its sinuosity, and with spurs of like irregularities and course constantly breaking off from it. It was necessary to run tentative lines and reverse lines and to note water-crossings and other landmarks.

It was practically impossible also to mark the line over the high and precipitous peaks, and this was not done.

In running a tentative line it was necessary to mark it, so that if it turned out to be the right line it would not have to be re-marked, and if it turned out to be the wrong line they would have the marks as a guide to prevent them getting lost again on that same spur. It was in this way that the commissioners made the mistake at the Tennessee river and went down Lester's ridge and went up Slick Rock creek searching for the supposed end of the mountain to connect with Lester's ridge. And it was in this same way that they made the mistake of running from Laurel Top down to State ridge (black line) in the case at bar.

But their work was not completed by running and marking the line or lines. After all this was done they had to *report* where they had found the true line. In the Hebard case they reported the "main ridge" and not Slick Rock

creek. In the case at bar they reported the "main ridge" and not the State ridge, which was a mere spur breaking off from the main ridge.

There can be no doubt that the red line is the main ridge, is higher than State ridge, except one peak, Grassy knob, and is the watershed or divide between the headwaters of Tellico river on the Tennessee side and Snowbird and other streams on the North Carolina side.

But the question recurs, "Why are no marks to be found on the red line or main ridge?"

It is easy to explain that it was not practicable to mark the line over the wind-swept tops of the high peaks on that line, but it might have been marked in the gaps, and no doubt was marked or intended to be marked there, as the commissioners reported that they ran and marked that main ridge. Larkin Brannum told one of the witnesses that he was told by the surveyors to mark that line after they found out their mistake at Tellico river, and said he did mark some trees on the western end of the line. Assuming that this line was marked in the gaps, then what has become of the marks? It is in proof that the marks along the mountain top, where the State line is conceded to be, are not now to be found in many places for miles (Hale's dep., pp. 25–'6), but that after the line left the mountain at the 101-mile post and started due south through the timbered country the marks are thick. The marks on the red line may have been destroyed in many ways. They were made in 1821, or 83 years ago. They were not protected in any way. They may have been destroyed designedly or wantonly, but the main ridge has not been destroyed, and still *stands there as an eternal monument* to mark the boundary line.

We must not be understood as claiming that the absence of marked trees on the red line is not a circumstance to be considered. "It is most difficult to account for" the absence of marked trees on this line. In the Hebard case, as before stated, the honorable circuit court of appeals decided *against* the Slick Rock Creek line, but said, "It is most difficult to account for this line of marked trees, irregularly as they are grouped. The probabilities are that they were marked by the commission." For what purpose? is the question. The court proceeds to find that the State line was on the "main ridge," and the Slick Rock Creek line was marked *tentatively*. So it is in the case at bar. If the State ridge (black) line was marked by the commissioners—and this question we will consider later on—still it is not the "main ridge" and must have been marked tentatively or by mistake.

The question, then, is whether the red line is the "main ridge" as called for in the act of 1821.

(1.) There is no doubt that the red line follows the ridge that divides the waters of Tennessee from the waters of North Carolina, and that it is the highest backbone from which the waters flow in both directions. All the witnesses prove this. The U. S. Geological Survey of this section, made in 1884–'5–'92 and filed with the record, shows it. Especial attention is called to the fact that this map also shows that the State line, both northeast and southwest of the disputed line, is on the backbone dividing the waters of Tennessee from the waters of North Carolina, and shows the headwaters of the several streams coming up to the backbone on both sides. It also shows that the State ridge (black line) breaks off from this backbone at or near Laurel

Top and descends to the Tellico river, just as the spurs marked Haw knob, Sassafras mountain, Big Fodder Stack, Little Fodder Stack, and Salt Spring mountains on the east and the numerous spurs on the west of Laurel Top, including Jenks ridge, Sugar mountain, &c. We think that this survey, made under the authority of the Government by experts of the highest character and attainments, begun in 1884 (before any controversy had arisen) and ended in 1892 (after the controversy began), is of the greatest significance. The honorable circuit court of appeals treated this subject, after reciting that in 1836 the State of Tennessee caused the Indian lands to be platted into the Ocoee district, as follows (p. 254):

"In making this survey in 1836 that officer (making the survey and plat) mistakenly included the lands in dispute within this survey, and they were platted and granted subsequently, as a part of the acquired Cherokee lands. This erroneous platting made by this surveyor seems to be the source of all doubt in respect to this line, *and is doubtless the origin of the error in the recent geodetic survey of this region shown by the official map published by the commission which adopts the line claimed by the appellants.*"

Just why the United States commission adopted the Ocoee District survey instead of the cession act of 1821, which fixed the line, is not stated by the honorable circuit court of appeals and is not apparent. These acts had been published and were easily accessible, while the plat of the Ocoee district had not been published, but was simply on record at Nashville and to be had only by going to Nashville for inspection or procuring a certified copy. The appellees claim that they own the disputed lands under grants from

North Carolina in 1875 covering them. These grants were just as accessible to the United States commission as the plat of the Ocoee district, and the parties claiming under them were right there on the ground ready, of course, to set up and point out their claim.

However, neither the plat of the Ocoee district nor the North Carolina grants were the proper source of information for the United States commission on the subject of the State line; but the cession act and the act of 1821, fixing the line, furnished the only proper guide for the commission. These experts decided that the red line was the main ridge and the State line after surveying and taking elevations for three years in that region.

As a further objection to the red line as the main ridge, the honorable circuit court of appeals on page 250 says:

"To take the proposed (red) line, an abrupt descent of about 500 feet must be made down the side of the State ridge when 'Mitchell's licks' is reached, a flat about one-fourth of a mile wide."

The proof is that the descent from the county corner to Mitchell's licks is 410 feet perpendicular.

Jasper L. Fain's deposition, p. 55.

Fain was along with the surveyor when he made the survey and leveled the descent. Now the geological (or geodetic) map shows that the mountain at Laurel Top, or county corner, where the descent is made to the red line, is 5,000 feet high. A descent of 410 feet would make Mitchell's licks 4,590 feet high, or higher than any part of State ridge, except the peak called Grassy knob. This makes Mitchell's licks itself a very high mountain—higher than any other portion of the red line except McDaniel's bald, which is

4,662, or only 72 feet higher than Mitchell's licks. It is also higher than the point where the black line reaches the main ridge at or near Beaverdam bald. None of the red line is placed lower than 3,000 feet on this map, and its general elevation unquestionably is greater than the mountains on either side, because it is the watershed, and this is conceded by the honorable circuit court of appeals at page 251.

The map filed as Exhibit "B" to W. D. Hale's deposition shows that Mitchell's licks is higher than any part of the State ridge except Grassy knob. In mountains of such height a descent of 410 feet is a small matter at best.

Again, the honorable circuit court of appeals has fallen into an error in saying that Mitchell's licks is about a fourth of a mile wide. Counsel for appellees made this same statement in their printed brief used in the circuit court of appeals, and refer to the depositions of J. L. Fain, McClelland, F. M. Lovingood, Hunesucker, A. A. Fain, and Hale. Now, one of these witnesses testified that in going down the mountain to Mitchell's licks it was 1,400 feet along the slope of the mountain to the point where they began to ascend the next peak after crossing Mitchell's licks. The only proof as to the width of this gap is that one witness says it lies so that 10 acres might be plowed there. However, what difference would it make whether it was a fourth of a mile or 5 miles? Its elevation is 4,590 feet and it is on the backbone.

As before stated, the act of 1821, based on the report of the commissioners, does not call for crossing Tellico river, but for the main ridge. On this point the honorable circuit court of appeals (p. 251) says:

"But where they crossed is little more than a creek and the stream short and of little significance. It is doubtful

whether the commissioners realized that the small stream crossed was the Tellico."

Now, the stream crossed was the "main prong" of Tellico river, and the commissioners could not have failed to realize that they were on Tellico river, because just beyond this point they call for "near the head of the West fork of Tellico." This West fork was insignificant as compared with the "main prong" or South fork, and the call for it shows beyond a doubt that the commissioners knew where Tellico river was, and would have called for it if their line had crossed it. One of the strongest reasons given by the court in the Hebard case for discarding the marked line up Slick Rock creek and holding to the main ridge was that the act of 1821 did not call for Slick Rock creek.

We therefore respectfully submit that the honorable circuit court of appeals was in error in rejecting the red line as the main ridge and the State line, because no marked trees were found upon it.

VII.

The honorable court of chancery appeals (p. 249) finds as follows:

"Along the State Ridge line are found a number of State-line trees bearing the State-line marks of two chops and a blaze for fore-and-aft trees and three chops on each side for side-line trees."

"By 'blocking' the annular rings of tree growth show to a demonstration that these trees were marked in 1821."

The Slick Rock creek had 41 of these marked trees, which were admitted to have been marked in 1821 by the commis-

sioners, and yet the honorable circuit court of appeals held that the marking was tentative only, and that the main ridge was the line.

We now beg leave to refer to the proof as to the marked trees on the State Ridge line.

O. W. Muller's deposition was taken in January, 1900, and he says that about ten years before that time (1890) he saw a number of trees on State ridge "hacked as line trees" (p. 19), and they appeared to be about ten years old. In September, 1895, he surveyed the Slick Rock Creek line and found several trees there marked with State-line marks. In December, 1895, he, Wilson, and Hale ran the State ridge and found several trees "blocked." He proceeds: "We also found some marks or rather indications (disturbances of the bark). We blocked some of these, but found no State-line marks that were old enough to be original." After crossing the Tellico river he found the holly claimed to be marked 86. M., but says it was not so marked. Near the holly was the stump of a pine tree. He had on a former occasion examined this pine tree and found two hacks on the north and two hacks on the south. It was like a fore-and-aft tree on a quarter-section line of the Ocoee district. It was not a State-line mark. We found no other old marks (p. 20).

On page 23 he says he saw some old marks on the black line and saw one tree marked with three hacks and a chop, "but they didn't look like any mark that a surveyor would make. They are about 6 inches long and close together, and they are not more than three feet, to the best of my recollection, from the ground." They were old marks in the bark; saw one that he thought might be State-line mark, but blocked it and found it was nothing but a blaze, and was too long for a surveyor's mark.

W. D. Hale run the State line in 1895 and found many trees with scars on them, but none recognized as State-line marks. On page 26 he says the State line was heavily marked with three chops made by McClelland in 1893. On pages 40 and 41 shows that he blocked one tree, but it was not a State-line mark. It was the same tree spoken of by Muller as blocked; saw a large mountain oak in a gap marked with three hacks, but did not "juggle" it; do not think it was a State-line tree, as the hacks were too long, as if made with a broad-axe; did not think the hacks had gone through the bark.

Jasper L. Fain, one of the defendants (p. 50), found a number of marks down State Ridge line; between 20 and 25 that show plainly and several that show one or two hacks, but not all of them. On page 52 he says he found the block cut out by Hale, Wilson and Muller, and it showed a State-line mark and showed 72 or 73 years old. On page 53 he says that he and Wilson blocked an oak October 14, 1899, and it was a fore-and-aft tree and showed 78 years, he believes. He filed as Exhibit "A" the juggle which Hale took out and which he found. This deposition was taken August 24, 1900, and the witness was recalled in January, 1901, and says he juggled a spruce pine and holly on the west side of Tellico river, and the juggles show 77 or 78 years.

F. M. Lovingood (p. 65), a surveyor, says he saw a number of trees marked on State ridge and blocked a maple near the river; couldn't tell the age of the marks, but they were old; also blocked a tree near where Fain lived, about one mile west of county corner. It had been marked with three hacks, and the growth of the tree proved to our satisfaction that it had been marked about the year 1821 (p. 66).

John R. McClelland (p. 69) says he run the line in 1893 and found marked trees all the way down State ridge. They were very old marks and were State-line marks.

Francis Lovingood (p. 105) identifies the juggles, Exhibits A and B to J. L. Fain's deposition, and says he juggled them; found a number of marked trees southwest of Tellico river.

R. A. Wilson (p. 109) says there are evidences of State-line marks on State ridge and has seen several marked trees on Jenks' ridge.

This is the evidence upon which the honorable court of appeals finds that the State Ridge line was marked in 1821 by the commissioners.

We respectfully submit that this evidence falls far short of proving to a demonstration that the State Ridge line is marked as a State line. We concede that there were many marked trees on that line, but it must be borne in mind that McClelland marked that line heavily in 1893, or seven years before these witnesses testify. After seven years these marks could be easily mistaken for older marks by persons not accustomed to tree marks.

Muller and Hale both show their qualifications for determining the age of marks, and both say there were no State-line marks on that ridge in 1895, when they and Wilson surveyed it; that they blocked some of the trees and found they were not State-line marks. They both speak particularly of one tree blocked by them, which showed merely a long blaze. This same block J. L. Fain found, and he says it was a State-line mark, and showed that it was made in 1821. The long blaze may have been made by Larkin Brannum in 1821 to deface the marks of the surveyors when they were lost in the fog and got off the line.

When this evidence of State-line marks on State ridge is boiled down it amounts to this, that Jasper L. Fain is the only witness who swears positively to State-line marks, while two disinterested surveyors swear positively that there were no State-line marks on that line. To say the least of it, the question whether that ridge had any State-line marks is left in grave doubt, and in any event the proof is not sufficient to overcome the plain call for the main ridge, a great natural boundary and permanent landmark.

In the Hebard case the Slick Rock Creek line was confessedly marked with State-line marks, and there was no question about it; nevertheless, it was held that the call for the main ridge controlled, and the marks on Slick Rock creek were made tentatively.

On page 255 the honorable circuit court of appeals undertakes to differentiate the Hebard case from the case at bar, and says:

"The marked difference between that case and this is, first in the fact that the 'main ridge' called for in the confirmatory acts of 1821, was far more clearly ascertained than in the present case; and, secondly, there was in that case evidence that two lines had been run and marked and old State-line marks shown on both lines. The call for the 'main ridge' was therefore supplemented by the existence of artificial monuments and this turned the scale over the other, although the more plainly marked line."

The only way that the main ridge was "ascertained" in the Hebard case was by taking the backbone of the mountain. It is equally well ascertained in this case. It is true that three partially discredited State-line marks were found on the main ridge in the Hebard case, but there were only

three in a distance of 10 miles, and it is shown in the proof in this case that frequently the admitted State line has no marks on it for many miles. Suppose that said three trees had been destroyed as all the other marked trees within that 10 miles had been! It is not possible that their destruction could have made the Slick Rock Creek line less tentative or have kept the Hangover lead from being the "main ridge" called for in the report.

It is too clear to admit of doubt that the purpose of the cession act was to make the backbone of the mountain the line between the States, and that the act of 1820 directed the commissioners to run the line designated by the cession act, and they had no power or authority to run any other line, and that the commissioners reported that they had run along the "main ridge" or backbone, and that the act of 1821 distinctly says that they did run along the backbone of the mountain. The effect of the decision of the court of appeals is to defeat the purpose and intention of both States and of the United States and to set aside the work of the commissioners and leave the State line open to wrangle and controversy at every point where there is a curve in the main ridge and a few tentative or accidental or fraudulent marks can be found on a spur.

VIII.

The honorable circuit court of appeals (p. 253) says this case in its essential facts is much like the case of *Virginia vs. Tennessee*, 148 *U. S.*, 503, and then quotes from that case as follows:

"Independently of any effect due to the compact as such, a boundary line between States or provinces, as between

private persons, which has been run out, located and marked upon the earth, and afterwards *recognized and acquiesced in by the parties for a long course of years,* is conclusive, even if it be ascertained that it varies somewhat from the courses given in the original grant: and the line so established takes effect, not as an alienation of territory, but as a definition of the true and ancient boundary."

After thus quoting from the Virginia *vs.* Tennessee case the honorable circuit court of appeals proceeds to apply the quotation to this cause as follows:

"In this aspect of the case we think the line 'run and marked' in 1821 was, by the confirmatory acts of each State, recognized and accepted as a running and marking of the line which actually existed before, a mere ascertainment and definition of the ancient boundary, and to be given effect even if it be now shown, under a more accurate knowledge of the topography of the region, that the State ridge was somewhat lower in average altitude than the more broken and difficult ridge constituting the watershed at this particular point."

The correctness of the principle announced in the Virginia *vs.* Tennessee case is so manifest that no one can deny it; but we do deny the application of that principle to the case at bar. The State ridge (black line) has not been "run out and marked" as the State line. Neither of the States has "recognized and acquiesced in" this line "for a long course of years."

The confirmatory acts of 1821 did not recognize the running and marking of the State Ridge line as the State line. Those acts recognized and accepted a line run and marked along the top of the "main ridge." In 1836, as soon as the

Indian title was extinguished, the State of Tennessee established a land district to cover these Indian lands, and had them run out and platted, and included the disputed lands up to the red line, and issued grants for them in 1842. This Ocoee survey was made only 16 years after the acts of 1821 were passed, when the commissioners and records were at hand to be consulted. A copy of the Ocoee District plat is introduced, and it is proven by Hale that this plat covers this land. The grants from the State are produced, and it is proven that they cover the land. This has been the attitude of Tennessee as to this line from 1836 to 1904, a period of 68 years. The United States Government, through its commission, recognized and adopted the red line as the true State line in 1884–'5–1892, and published to the world its map showing that the red line was the true State line. Have the parties claiming the land recognized and acquiesced in the black line as the State line? The first white man settled in that region in 1880, and it was not until 1890 that the settlements increased.

On the 15th day of January, 1895, the appellants filed their bill of ejectment in the chancery court of Monroe county, Tenn., and ejected three of said settlers. *See transcript of the record in said cause at page 199 of the printed Record.*

On the 13th day of January, 1889, appellants filed their bill in the U. S. circuit court at Knoxville against six other of said settlers, including the defendant Jasper Fain, and secured a final decree ejecting them from said land. *See transcript at page* 181 *of printed Record.*

On April 28, 1899, the bill in the case at bar was filed.

So far have the appellants been from recognizing and ac-

quiescing in the black line that they have promptly and persistently brought suit against all persons found west of the red line not holding as their tenants.

It thus clearly appears that neither the State of Tennessee nor the appellants ever recognized or acquiesced in the black line as the State line, and the case of Virginia *vs.* Tennessee can have no application.

The State of North Carolina has never claimed the black line to be the true State line and, so far as the record shows, has never even issued any grants for land inside the disputed territory. It is true that appellees say they claim the disputed land under North Carolina grants issued in 1875, and it is true that they file a lot of grants; but it does not appear from the proof or from the grants themselves that they cover the disputed land. These grants will be found on pages 73 to 85, inclusive, for 50 acres, 50 acres, 100 acres, 50 acres, 100 acres, and 100 acres—in all, 450 acres. The only proof on these title papers will be found in the depositions of Jasper L. Fain, at page 57.

His counsel asked him the question:

"I will ask you to file as Exhibit 'B' to your deposition a certified copy of the *grant* to M. Fain from the State of North Carolina *for the land in litigation.*

"Answer. I will do so.

"Question. Now, I will ask you to state whether or not the ranch you have been living on since 1889 is located on the land covered by the grant.

"Answer. Yes, sir."

None of these grants are filed as Exhibit "B," so that it is impossible to know which one of them the witness intended to say covered his ranch. It is not shown where

any of the lines or corners are upon the ground, and the mere statement of the witness that the grant covered the land would be insufficient.

All of these grants were issued in 1875 and had upon their face a condition that they should be void if not registered in Cherokee county within twelve months from date. The certificates of the register on all of said grants show that they were not registered until 1880, or five years after they were issued.

We refer to these grants to show that North Carolina never set up any claim to this land, and we must not be understood as claiming that appellants can recover on account of the weakness of their adversary's title.

Our title depends upon whether or not the land is in Tennessee.

IX.

In conclusion, we submit that the red line is the "main ridge."

O. W. Muller (p. 21) says:

"There is no other continuous ridge between the undisputed points. Standing on the spur (State ridge) on which the McClelland line is marked, the ridge running around the headwaters of the Tellico stands out prominent and distinct with its knobs and gaps, all higher than this cut-off (black) line, except where they join the north and south end, the Grassy knob being a knob close to the point of junction at the north end and Jenks' knob at the south."

The Government map shows the elevation of the red line to be more than 4,000 feet high.

It is the watershed and divides the waters of Tennessee from the waters of North Carolina.

All the witnesses agree that it is higher than the black line.

Who can say, after the lapse of 83 years, that it was not marked, especially in view of the fact that great stretches of miles are found on the *admitted* "main ridge" where the marks are gone.

This is the main ridge called for in the cession act, in the acts of 1821, in the survey of the Ocoee district, and in the grants issued by the State of Tennessee, and it does not call for crossing the Tellico river.

For convenient reference we append copies of the cessiou act and the acts of 1820 and 1821.

CHARLES SEYMOUR, *Counsel.*

T. S. WEBB,
HU. L. MCCLUNG,
L. M. G. BAKER,
Of Counsel.

APPENDIX TO APPELLANTS' BRIEF.

I.

North Carolina Cession Act of December 3, 1789.

SECTION 1. *Be it enacted by the General Assembly of the State of North Carolina, and it is hereby enacted by authority of the same,* That the Senators of this State in the Congress of the United States, or any of the Senators and any two of the Representatives of this State in the Congress of the United States are hereby authorized, empowered and required to execute a deed or deeds on the part and behalf of this State conveying to the United States of America, all right, title, and claim which this State has to the sovereignty and territory of the lands situate within the chartered limits of this State, west of a line beginning on the extreme height of the Stone mountain, at the place where the Virginia line intersects it, running thence along the extreme height of the said mountain, to the place where the Watauga breaks through it, thence a direct course to the top of the Yellow mountain, where Bright's road crosses the same, thence along the ridge of said mountain between the waters of Doe river and the waters of Rock creek, to the place where the road crosses the Iron mountain, from thence along the extreme height of said mountain to where Nolichucky river runs through the same, thence to the top of the Bald mountain, thence along the extreme height of the said mountain to the Painted rock, on French Broad river, thence along the highest ridge of the said mountain to the place where it is called the Great Iron or Smoky mountain, *thence along the extreme height of the said mountain, to the place where it is called Unicoy or Unaka mountain* between the Indian towns Cowee and Old Chota, thence along the main ridge of said mountain, to the southern boundary of this State, upon the following express conditions, and subject thereto:

Whitney's Land Law, p. 46.

II.

Tennessee Act of July 23, 1820, *Chapter* 22.

Be it enacted by the General Assembly of the State of Tennessee, That the governor shall be, and he is hereby authorized, to appoint three commissioners to meet the commissioners, who have been or may be appointed by the State of North Carolina, at such time and place as may by the said commissioners, or by a majority of those representing the respective States be agreed on, and with them to settle, run and remark the boundary line between this State and the State of North Carolina agreeably to the true intent and meaning of the said act of the General Assembly of the State of North Carolina, entitled "An act for the purpose of ceding to the United States of America, certain western lands therein described," commonly called the cession act.

III.

Tennessee Act of November 9, 1821, *Chapter* 35.

Be it enacted, etc., That the dividing line run and marked by Alexander Smith, Isaac Allen and Simeon Perry, commissioners, for and on behalf of this State; and James Mebane, Montfort Stokes and Robert Love, commissioners, for and on behalf of the State of North Carolina; which dividing line as run by said commissioners, begins at a stone set on the north side of Cataloochee turnpike road, and marked on the west side Tenn. 1821, and on the east side N. C. 1821; running thence on a southwestwardly course to the Bald rock, on the summit of the Great Iron or Smoky mountain, and continuing southwestwardly on the extreme height thereof to where it strikes Tennessee river about seven miles above the old Indian town Tallassee, crossing Porter's gap, at a distance of twenty-two miles from the be-

ginning, passing Meig's boundary line at thirty-one and a half miles, the Equovettly path at fifty-three miles and crossing Tennessee river at the distance of sixty-five miles from the beginning; from Tennessee river to the main ridge and along the extreme height of the same to the place where it is called the Unicoy or Unaka mountain, striking the old trading path leading from the valley town to the overhills towns, near the head of the West fork of Tellico river, and at the distance of ninety-three miles from the beginning, thence along the extreme height of the Unicoy or Unaka mountain to the southwest end thereof, at the Unicoy or Unaka turnpike road, where a cornerstone is set up marked Ten. on the west side and N. C. on the east side, and where a hickory tree is also marked on the south side Ten. 101 M. and on the north side N. C. 101 M. being one hundred and one miles from the beginning; from thence a due course south two miles and two hundred and fifty-two poles to a spruce pine on the north bank of the Hiwassee river, below the mouth of Cane creek; thence up the river the same course, about one mile, and crossing the same to a maple marked W. D. and R. A. on the south bank of the said river; thence continuing the same course due south eleven miles and two hundred and fifty-three poles to the southern boundary line of the State of Tennessee and North Carolina, making in all one hundred and sixteen miles and two hundred and twenty-three poles from the beginning; and striking the southern boundary line twenty-three poles west of a tree in said line marked 72 M. where was set up by said commissioners a square post marked on the west side Ten. 1821 and on the east side N. C. 1821, and on the south side G., be and the same is hereby ratified, confirmed and established as the true boundary line between this State and the State of North Carolina.